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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SHARON TYUS; FREEMAN BOSLEY, SR.; BERTHA MITCHELL; IRVING CLAY, JR.; and CLAUDE TAYLOR,

Petitioners,

v.

FREEMAN BOSLEY, JR., in his capacity as Mayor, City of St. Louis, Missouri; THOMAS A. VILLA, in his capacity as President, Board of Aldermen, City of St. Louis, Missouri; BOARD OF ALDERMEN, City of St. Louis, Missouri; and CITY OF ST. LOUIS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITIONERS' REPLY BRIEF

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14pp

TABLE OF CONTENTS

	PAGE
I. THE LOWER COURT ERRED ON AN ISSUE OF MAJOR NATIONAL IMPORTANCE IN HOLDING, AS A MATTER OF LAW, THAT INTENTIONAL DISCRIMINATION IS NOT ACTIONABLE UNDER §2 OF THE VOTING RIGHTS ACT WHERE A REDISTRICTING PLAN ACHIEVES THE "BALANCED BOTTOM LINE" OF PROPORTIONALITY	1
II. THE LOWER COURT ERRED IN USING PROPORTIONALITY AS A "SAFE HARBOR" DEFENSE AGAINST PLAINTIFFS' §2 "EFFECTS" CLAIM	5
III. THIS COURT NEEDS TO RESOLVE THE CONFLICT IN THE LOWER COURTS REGARDING THE PROPER MEASURE OF PROPORTIONALITY, AND SHOULD MAKE CLEAR THAT TOTAL POPULATION, RATHER THAN VOTING-AGE POPULATION, IS THE RELEVANT BASELINE	8
IV. PETITIONERS HAVE STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP	9
CONCLUSION	10

TABLE OF AUTHORITIES

Cases	PAGE
Baird v. Consolidated City of Indianapolis, 976 F.2d 357 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2334, 124 L.Ed.2d 246 (1993) ..	3
Barnett v. Daley, 809 F.Supp. 1323 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994)	7, 9
City of Richmond, Virginia v. U.S., 422 U.S. 358, 95 S.Ct. 2296, 45 L.Ed.2d 245 (1975)	3
Connecticut v. Teal, 457 U.S. 440, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982)	2
DeWitt v. Wilson, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part and appeal dismissed in part*, ___ U.S. ___, 115 S.Ct. 2637, 132 L.Ed.2d 876 (1995)	9
Furnco Const. Corp. v. Waters, 438 U.S. 567, 98 S.Ct. 2943, 57 L.Ed.2d 957 (1978)	2
Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 111 S.Ct. 681, 112 L.Ed.2d 673 (1991)	4, 5, 8
Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 99 S.Ct. 1601, 60 L.Ed.2d 66 (1979)	10
Johnson v. DeGrandy, ___ U.S. ___, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994)	2, 3, 5
Miller v. Johnson, ___ U.S. ___, 115 S.Ct. 2475, 132 L.Ed.2d 762 (1995)	3, 9
Shaw v. Reno, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)	3

United States v. Hays, ___ U.S. ___, 115 S.Ct. 2431, 132 L.Ed.2d 635 (1995) 9

Warth v. Seldin, 422 U.S. 490, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975) 10

Statutes

United States Constitution, 15th Amendment 1

42 U.S.C. §1973 7

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PETITIONERS' REPLY BRIEF

I. THE LOWER COURT ERRED ON AN ISSUE OF MAJOR NATIONAL IMPORTANCE IN HOLDING, AS A MATTER OF LAW, THAT INTENTIONAL DISCRIMINATION IS NOT ACTIONABLE UNDER §2 OF THE VOTING RIGHTS ACT WHERE A REDISTRICTING PLAN ACHIEVES THE "BALANCED BOTTOM LINE" OF PROPORTIONALITY.

As plaintiffs argued in their opening brief, even if the Eighth Circuit's use of a "balanced bottom-line" approach was appropriate to dispose of plaintiffs' §2 "effects" claim against the 1991 St. Louis ward map, the use of proportionality to insulate the map from plaintiffs §2 "intent" claim directly contradicts holdings by both this Court and other circuits. In response, defendants repeat the Eighth Circuit's argument that to succeed, a §2 "intent" claim must show some form of vote dilution ("discriminatory effect"), and that intent plays little or no role in evaluating voting rights claims under §2.

Defendants' argument exhibits a fundamental misunderstanding of the text, logic and purpose of §2. To begin with, defendants are mistaken when they argue that the language of §2 solely "speaks to a results claim." (Respondents' brief 8; hereinafter "RB.") The language of §2(b), which was added by the 1982 amendment to the Voting Rights Act and does deal exclusively with "results" claims, *supplemented* rather than *supplanted* the original language of §2 (now §2(a)); that original language, which prohibits any type of discrimination on account of race and which has been interpreted to be coextensive with the demands of the Fifteenth Amendment, remains in full force and provides an alternative route to those plaintiffs who may have suffered intentional discrimination (*e.g.*, intimidation at the polling place or intentional gerrymandering) that is not subject to proof under §2(b) "results" claim analysis.

Moreover, both the Eighth Circuit and defendants appear to mistakenly believe that a failure to prove a §2 "effects"

claim necessarily means plaintiffs' cannot prove a claim of intentional racial gerrymandering. In fact, precisely because the nature of the proof required in an intent claim may differ from the nature of the proof required in an "effects" claim, a claim of intentional discrimination can be established even where an "effects" claim is foreclosed.

To see why this is true, it is useful to draw an analogy to discrimination cases in the employment context. Under Title VII, employees may sue under either a theory of disparate impact ("effect") or disparate treatment ("intent"). Proof that an employer maintains a racially-balanced workforce may be sufficient to defend against a Title VII disparate impact claim; to the extent that the plaintiff is relying solely on the aggregate numbers to make out his claim, the employer may rebut such evidence with his or her own set of numbers. On the other hand, "a racially-balanced workforce cannot immunize an employer from liability for specific acts of discrimination." *Furnco Const. Corp. v. Waters*, 438 U.S. 567, 580 (1978); *see also Connecticut v. Teal*, 457 U.S. 440, 452-56 (1982) (rejecting "bottom-line" defense under Title VII). Even where a racially-balanced workforce exists, a group of employees may still assert that, under a disparate treatment theory, a supervisor has hurled racial epithets at them, or assigned them to the most difficult jobs, or made their promotions more difficult. To win on this claim, plaintiffs cannot simply rely on aggregate numbers; rather, they must gather particularized evidence of the alleged disparate treatment. But if plaintiffs do in fact gather and present such proof, the employer's defense must also be particularized; a showing that the employer maintains a racially-balanced workforce, without more, will not save that employer from a finding of liability under Title VII.

What is true in the employment context is true in the voting rights context. *See Johnson v. DeGrandy*, 114 S.Ct.

2647, 2660-61 (1994); *Baird v. Consolidated City of Indianapolis*, 976 F.2d 357, 360 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 2334 (1993). Like a racially-balanced workforce, the existence of sustained proportionality may be a sufficient defense to an "effects" claim, where plaintiffs' sole evidence that their voting strength has been diluted is a lack of such proportionality. In this case, however, plaintiffs have presented particularized and thus far undisputed evidence that (a) ward boundaries have been systematically drawn to maximize white voting strength and minimize black voting strength; and (b) these boundaries cannot be explained by any traditional, race-neutral redistricting criteria. In other words, at this stage of the litigation, plaintiffs have made out a strong case of intentional racial gerrymandering. Once sufficient allegations of discriminatory intent have been offered, the presence or absence of proportionality recedes in importance; rather than relying on a "safe harbor" defense of proportionality, defendants must now come back with equally particularized evidence that either directly disputes plaintiffs' facts or provides credible, race-neutral explanations for why ward boundaries were drawn as they were drawn.

It is this simple principle—that a balanced bottom-line does not excuse invidious, race-based decision-making by the state along the way—that underlies this Court's holding in *City of Richmond v. U.S.*, 422 U.S. 358, 378-79 (1975). It is also the underlying principle behind the analytically distinct equal protection claims recognized in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), and *Miller v. Johnson*, 115 S.Ct. 2475 (1995). These cases all establish that even where plaintiffs cannot show any "discriminatory effect" as the term is defined in garden-variety vote dilution claims, plaintiffs may still offer evidence—*e.g.*, memoranda or testimony indicating maximization of control for a particular racial group was an overriding factor in redistricting, or

"bizarrely-drawn" districts that cannot be explained by traditional redistricting principles—that residents of a jurisdiction were treated differently on account of race in violation of the Voting Rights Act.

Surprisingly, in making their argument that a §2 intent claim is not possible without a showing of vote dilution, respondents invoke the important Ninth Circuit holding concerning ethnicity-based redistricting in the County of Los Angeles. *See, Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991). In fact, *Garza* endorses the exact legal principal we urge here: that intentional discrimination is unlawful under §2 even if a traditional §2 vote dilution claim cannot be established. In *Garza*, the County of Los Angeles could not prevail under §2 because they could not meet the *Gingles* preconditions; in particular, plaintiffs could not establish that they could have constituted a majority in any additional districts. *Id.*, at 771. Thus, plaintiffs could not establish a traditional vote dilution claim. Yet that was no barrier to plaintiffs' pursuit and successful proof of their claim that they had been intentionally discriminated against. As the *Garza* court stated in its opinion:

> To impose the requirement the County urges would prevent any redress for districting which was *deliberately designed* to prevent minorities from electing representatives in future elections governed by that districting. This appears to us to be a result wholly contrary to Congress' intent in enacting §2 of the Voting Rights Act and contrary to the equal protection principles embodied in the fourteenth amendment.

Id., at 771 (emphasis added).

Garza did, appropriately, require that plaintiffs establish some concrete injury resulting from this intentional discrimination:

> Although the showing of injury in cases involving discriminatory intent need not be as rigorous as in effects cases, some showing of injury must be made to assure that the district court can impose a meaningful remedy.

Id. The sufficient injury in *Garza* was the same as that alleged here: intentional discrimination diminished the voting power statutorily-protected voters would have had if the districting process had not been motivated by invidious intent.

II. THE LOWER COURT ERRED IN USING PROPORTIONALITY AS A "SAFE HARBOR" DEFENSE AGAINST PLAINTIFFS' §2 "EFFECTS" CLAIM.

As petitioners documented in our opening brief, the affidavit of plaintiffs' expert, Dr. Charlene Jones, amply testified that defendants manipulated ward boundaries unevenhandedly to (a) fracture blacks but not whites; (b) excessively pack blacks but not whites; (c) restore white voting-age majorities in wards that had become majority or plurality black and did not need to be redrawn, in contradiction of traditional redistricting standards, and without creating any comparable black-majority wards where whites were a majority or plurality of the population; (d) all with the intent and effect of minimizing black voting strength and maximizing white voting strength (50, 87-89). By entirely disregarding these facts at the summary judgment stage, the Eighth Circuit effectively circumvented this Court's holding in *DeGrandy* that even sustained proportionality is not a "safe harbor" in a §2 "effects" challenge, but may be overcome by a showing that a redistricting plan treats racial groups "inconsistent[ly]." *DeGrandy*, 114 S.Ct. at 2655, 2659.[1]

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[1] Rather than directly addressing plaintiffs' arguments that the Eighth Circuit erred as a matter of law in using proportionality

(continued...)

That neither the Eighth Circuit nor respondents perceive a "discriminatory effect" in this plethora of undisputed facts indicates the degree to which, as a matter of law, proportionality served as a "safe harbor" and precluded any inquiry into actual vote dilution. The Eighth Circuit's legal error results from the insistence on equating proportionality with the absence of vote dilution. As plaintiff explained at length in briefing before the Eighth Circuit, proportionality may in fact be the best measure of discriminatory effect in many traditional §2 vote dilution cases, particularly those cases challenging at-large, multi-member districts in juris-

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[1] (...continued)

as a "safe harbor" defense in dismissing both plaintiffs' §2 "intent" and "effects" claims, respondents accuse petitioners of presenting evidence of differential treatment that is "unsupported" in the record (RB 10). Defendants' attempt to cast doubt on plaintiffs' presentation of the facts is misguided: every fact asserted in plaintiffs' petition, including the official city ward map attached as Exhibit H, is part of the Eighth Circuit record and is thus far uncontested.

This is certainly true of the three specific facts that respondents claim are "unsupported" by the record. First, plaintiffs' evidence shows that the six central-corridor wards systematically fracture black population; and there is ample geographically-compact black population in the central corridor for *at least* two black wards (88-89). The acknowledgement of this fact is not an argument "that black voting power must be maximized" (RB 10). The Eighth Circuit itself recognized that "[b]ecause of the combined effects of geography and segregation, the aldermanic wards may be drawn to create . . . seventeen safe black wards" (A6), or at least *four* more effective black-majority wards in the central-corridor area. Defendants have never pointed to any white population that could have been part of a white-majority ward but was instead "fractured" into an effective black ward.

Second, plaintiffs' statement in their opening brief that 90% of the city's white and black residents live within contiguous boundaries comes from the Eighth Circuit's opinion (A5). Finally, the fact that "ward boundaries were manipulated to restore white voting-age majorities in wards that had become majority or plurality black" comes directly from Dr. Jones's affidavit (87).

dictions containing only two significant racial groups. The implicit assumption in such cases is that, where the *Gingles* preconditions have been shown to exist, an evenhanded process of redistricting would produce a roughly-proportionate number of minority-controlled districts.

In other contexts, however, proportionality will not accurately measure discriminatory effect. This case presents an example of a situation where proportionality will not necessarily measure discriminatory effect—that is, where the minority population is younger than the white population, racial bloc voting is prevalent, and housing patterns are such that a handful of wards subject to redistricting can be drawn to contain either black or white majorities.[2] In such a situation, map drawers may "pack" and "fracture" black populations along adjoining black and white communities so as to maximize the number of white-majority wards and minimize the number of black-majority or plurality wards. The resulting discriminatory effect is both obvious and significant: black voting power is diminished below what would result from a fair, evenhanded, and non-invidious political process. *See* 42 U.S.C. §1973(b).

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[2] A second example can be found in those jurisdictions that contain not only blacks and whites, but also Latinos or Asians who are scattered among both black-majority and white-majority communities, and therefore are not sufficiently geographically-compact to control their own single-member district. In such a situation, a white-controlled legislature may gerrymander districts to ensure that the scattered Latino or Asian communities "stretch" the number of white-dominated wards and enhance the election chances of white incumbents, even while providing blacks with rough proportional representation. *See, e.g., Barnett v. Daley*, 809 F.Supp. 1323, 1329 (N.D.Ill. 1992), *rev'd*, 32 F.3d 1196 (7th Cir. 1994).

III. THIS COURT NEEDS TO RESOLVE THE CONFLICT IN THE LOWER COURTS REGARDING THE PROPER MEASURE OF PROPORTIONALITY, AND SHOULD MAKE CLEAR THAT TOTAL POPULATION, RATHER THAN VOTING-AGE POPULATION, IS THE RELEVANT BASELINE.

Respondents assert the lower courts are not in direct conflict over whether the proper baseline for determining proportionality in a §2 case is total population or voting-age population—or even other possible baselines, such as citizen voting-age population. But this important question, which will necessarily recur in every case in which the defense of proportionality is raised, is one on which the lower courts are, in fact, squarely divided.

In this case, the Eighth Circuit directly rejected petitioners' position that total population provides the appropriate legal standard; instead, the Eighth Circuit held that voting-age population provides the correct legal standard (A16-18). In direct contrast, the Ninth Circuit has held precisely the opposite in a case respondents inexplicably ignore:

> Adherence to a population standard, rather than one based on registered voters, is more likely to guarantee that those who cannot or do not cast a ballot may still have some voice in government.

Garza, 918 F.2d at 775. As the Ninth Circuit reasoned in *Garza*, another case involving redistricting of a major urban area:

> Basing districts on voters rather than total population results in serious population inequalities across districts. Residents of the more populous districts thus have less access to their elected representative.

Id., at 774.

Similarly, the three-judge court that recently reviewed the redistricting of the California legislature also explicitly rejected the argument that voting-age population, rather

than total population, should provide the basis for judging the fairness of redistricting under the Voting Rights Act. *DeWitt v. Wilson*, 856 F.Supp. 1409 (E.D.Cal. 1994), *aff'd in part and appeal dismissed in part*, 115 S.Ct. 2637 (1995). In direct contrast to the Eighth Circuit, the three-judge court concluded:

> There is no merit to this contention [that voting-age population should provide the baseline]; population, not voter registration, is the appropriate basis for apportioning districts.

Id., at 1414 (citing *Reynolds v. Sims*, 377 U.S. 533 (1964)). *See also Barnett v. Daley*, 32 F.3d 1196, 1200 (7th Cir. 1994).

IV. PETITIONERS HAVE STANDING UNDER §2 OF THE VOTING RIGHTS ACT TO CHALLENGE ST. LOUIS' 1991 WARD MAP.

Respondents also argue that petitioners, all of whom are black registered voters and residents of St. Louis, lack standing to bring this vote dilution claim. Respondents base this argument exclusively on this Court's opinion in *United States v. Hays*, 115 S.Ct. 2431 (1995).

Nothing in *Hays* supports defendants' novel contention that residents of "packed" districts lack standing to bring a vote dilution challenge. *Hays* did not involve vote dilution claims brought under the Voting Rights Act, but instead involved claims brought under the equal protection analysis set forth in *Shaw* and *Miller*. As this Court has repeatedly emphasized, such *Shaw/Miller* claims are "analytically distinct" from vote dilution claims; *see Miller*, 115 S.Ct. at 2485, they do not depend on a showing that a plaintiff's vote has been diluted.

More specifically, vote dilution claims and *Shaw/Miller* claims rest on different categories of injury. As such, they require different showings to establish standing. Because

the injuries resulting from a *Shaw/Miller* violation may be "difficult to discern," a court cannot infer that a plaintiff living outside the district that is subject to the racial gerrymander is asserting a personalized harm, rather than a "generalized grievance against government conduct of which he or she does not approve." *Hays*, 115 S.Ct. at 2436. In contrast, the injuries to plaintiffs in a vote dilution case are by their very nature direct and palpable; black voters who have been "packed" or "fractured" are not only stigmatized on the basis of race, but suffer from the wasting of their votes and the deprivation of influence in other wards. *See, Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979); *Warth v. Seldin*, 422 U.S. 490, 499 (1975). These are the injuries that petitioners in this case assert, and under long-standing principles involving vote dilution litigation under the Voting Rights Act, black residents and voters throughout the jurisdiction have standing to challenge a redistricting plan that dilutes the votes of blacks as a group.

CONCLUSION

For all the reasons stated above, a writ of certiorari should be issued to review the judgment and opinion of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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